Supreme Court, U.S.
FILED

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No._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2002

MARIE BERTHE FRANCOIS, Petitioner

v.

PUTNAM INVESTMENTS, Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. At what point does the worker's Seventh Amendment right to a jury trial on a claim of racial discrimination against an employer violated by the court's application of Federal Rules of Civil Procedure Rule 56, 28 U.S.C.A.

PARTIES TO PROCEEDING BELOW

The parties to the proceedings below are Plaintiff-Petitioner Marie Berthe Francois and Defendant-Respondent Putnam Investments, LLC.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner Marie Berthe Francois respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for for the First Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix, infra.) is not published.

JURISDICTION

The court of appeals entered its judgment on April 25, 2002 and entered its denial of a petition for re-rehearing en banc on July 23, 2002 (Appendix, infra.). The jurisdiction of this court is invoked under 28 28 U.S.C. &1254 (I).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution:

U.S. Const. Amend. VII provides, in pertinent part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of a trial by jury shall be preserved...."

Statutes:

28 U.S.C.A., Fed Rules of Civ. Proc.Rule 56

Title VII of the 1964 Civil Rights Act

Mass. Gen. Laws, c. 151B, sec. 4

STATEMENT OF THE CASE

Petitioner, Marie Berthe Francois ("Francois"), filed a civil action against Respondent, Putnam Investments, LLC., ("PutnamA"), asserting that Putnam had violated violated her rights under Massachusetts General Laws, c. 151B, sec. 4, paragraph 1 and under Title VII of the 1964 Civil Rights Act.

The allegations brought by Francois in the federal district court in Massachusetts accused Putnam of racially discriminating against her while she was employed at the company.

Putnam denied the allegations and subsequently filed a motion for summary judgment pursuant to Fed. Rules of Civ. Proc.Rule 56. Francois opposed the motion, and without a hearing, the district court allowed the motion on May 29, 2001.

Francois filed an appeal on June 22, 2001 with the United States Court of Appeals for the First Circuit, which on April 25, 2002 affirmed the lower court's decision. On July 23, 2002, the First Circuit denied Petitioner's petition for rehearing en banc.

A. The Pertinent Facts

Francois began working for Putnam, an investment company, on October 6, 1996 on a part-time basis with the promise that she would become a full-time employee within a month. She was later assured of that position because Putnam was satisfied with her work productivity.

However, on November 8, 1996, she was told by her supervisor that she would not be hired because of dissatisfaction with her work, notwithstanding the fact that from October to December of that year, the only derogatory data in Putnam's files regarding her was verbal warnings for alleged tardiness.

At that time Francois was the only black employee in Putnam's Adjustments Department. Later it was revealed that a white female was hired as a permanent Putnam employee on October 21, 1996 and two additional employees were promoted to permanent full-time status on December 9 of that year.

Prior to Francois leaving Putnam in January 1997, she also was subjected to racially derogatory remarks from her department manager and a supervisor. She was asked, for example, whether she practiced voodoo; it was asserted that she came to the United States in a boat – a reference to her national origin (Haitian) – and there were nasty remarks regarding her accent. In addition, a supervisor alluded to the "real racists at Putnam" while telling Francois that he was told "to get rid of" of her.

A racial discrimination complaint was filed by Francois against Putnam with the Massachusetts Commission Against Discrimination ("MCAD"), which on July 8, 1997 found, following an investigation, that she had been discriminated against by Putnam based on her race/color and national origin. Francois subsequently filed her verified complaint, which included a demand for a jury trial.

REASONS FOR GRANTING THE WRIT

The decision of the First Circuit in this case is contrary to the standard that should be applied in allowing summary judgment pursuant to Fed. Rules Civ. Proc. Rule 56, 28 U.S. C.A and, in affirming that judgment, the court has infringed on the petitioner's right to a jury trial pursuant to the Constition's Seventh Amendment.

What the First Circuit has failed to do is to ignore the fact that there exists in the total record of this case sufficient conflicting evidence to warrant a conclusion that genuine issues of material fact exist. That conclusion precludes the allowance and affirmation of a summary judgment motion.

Notwithstanding the First Circuit's acknowledgement that it must consider the evidence "in the light most favorable to, and drawing all reasonable inferences in favor of, the non-moving party" (see *Felicinao de la Cruz v. El Conquistador Resort & Country Club*, 218 F.3d 1, 5 (1st Cir. 2000), it has not done so.

The court brushes aside conflicting information regarding the work performance of Francois, in part, derived from the petitioner's verified complaint and Putnam's own documents regarding her job performance, pays no heed to the MCAD finding, notwithstanding the fact that is part of her verified complaint, seemingly bypasses and/or shuns the racially derogatory remarks in an effort to not only deny that a factual dispute exists but also to justify its position that evidence of pretext was not present and no discriminatory animus exists.

The very existence of biased remarks may support an inference of pretext, and discriminatory remarks related to the decisional process may be sufficient to prove an employer's alleged animus. *Rivera-Rodriquez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 20 (2001). Furthermore, as held in *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23 (2001), the Court of Appeals must exercise particular caution before sustaining summary judgment for employers in discrimination actions on such issues as pretext, motive and intent.

The First Circuit has erred in undercutting Francois' supporting material while giving too much credence to Putnam's self-serving documents while not recognizing that it is the

very nature and content of opposing sworn statements that support the position that there exists disputed issues of material fact that needed to be determined by the factfinder.

Contrary to the First Circuit's statement regarding oral argument in this case, the court was informed that MCAD had concluded that Putnam had discriminated against Francois.

The First Circuit held in *Simas v. First Citizens' Federal Credit Union*, 170 F.3d 37 (1999), the competence of the nonmovant's own testimony is treated no differently than that of any other potential trial witness. Yet it is not adhering to that standard in this case

The First Circuit has not moved with caution regarding its affirmation of summary judgment in this case and, as a result, has thwarted the petitioner's right to a jury trial.

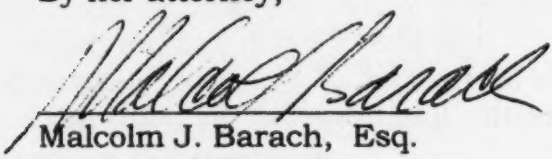
CONCLUSION

For the above reasons, the Petitioner, Marie Berthe Francois, respectfully requests that this court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

Marie Berthe Francois,

By her attorney,



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